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No. 06-1431

IN THE

# Supreme Court of the United States

CBOCS WEST, INC.,

*Petitioner*,

*v.*

HEDRICK G. HUMPHRIES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF HISTORIANS Mary Frances Berry, Paul Finkelman, Robert J. Kaczorowski, Stanley N. Katz, David Levering Lewis, Leon F. Litwack, James M. McPherson, William M. Wiecek and 40 other Scholars SUPPORTING RESPONDENT

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January 3, 2008

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

No. 06-1431

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**MOTION of HISTORIANS Mary Frances Berry, Paul Finkelman, David Lewis Levering, Robert J. Kaczorowski, Stanley N. Katz, Leon F. Litwack, James M. McPherson, William M. Wiecek and 40 other scholars FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Pursuant to this Court's rule 37.3(b), the Historians listed above hereby request leave to file the accompanying *amicus curiae* brief supporting the respondent. Counsel for respondent has consented to the filing of this brief. Counsel for petitioner CBOCS West, Inc. has withheld consent.

The question presented in this case is whether 42 U.S.C. § 1981 includes a claim for retaliation. Section 1981 was originally enacted as a part of the Civil Rights Act of 1866. Both petitioner and respondent have noted quite correctly that the historical context of the statute's enactment is relevant to its current interpretation. The issue before the Court in this case requires an understanding of the evils the Reconstruction Congress sought to address and the tools they used to do so when the Civil Rights Act was passed more than 140 years ago. The *Amici* are historians who have carefully studied race relations, the Civil War and the Reconstruction period. As historians, *Amici*'s professional responsibility is to explain and contextualize historical facts. Accordingly, they are particularly qualified to provide the Court with a historical perspective on the interpretive question presented in this dispute. For these reasons, *Amici* respectfully request leave to file the accompanying amicus curiae brief.

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Respectfully submitted,



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## INTEREST OF *AMICI CURIAE*[1]

This brief is submitted on behalf of the above-named historians and those listed in Appendix A, who respectfully urge the Court not to eliminate the protection against retaliation afforded by 42 U.S.C. § 1981.

The issue before the Court in this case requires an understanding of the evils the Reconstruction Congress sought to address and the tools they used to do so when the Civil Rights Act was passed more than 140 years ago. The *Amici* are scholars who have carefully studied American legal history, race relations, the Civil War and the Reconstruction period.

Dr. Mary Frances Berry is the Geraldine R. Segal Professor of American Social Thought and Professor of History at the University of Pennsylvania, a former Commissioner and Chair of the U.S. Commission on Civil Rights. Dr. Berry has published numerous books on American Legal History and in particular on slavery, the Civil War and the Reconstruction era.

Dr. Paul Finkelman is the President William McKinley Distinguished Professor of Law and Public Policy at the Albany Law School. He has published over 20 books and more than 100 articles, with a

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

particular focus on slavery, race, civil rights and the Constitution.

Dr. Stanley N. Katz is a Lecturer with the rank of Professor at the Woodrow Wilson School at Princeton University. He has written and edited several books and articles on United States history and has served as president of the Organization of American Historians, the American Society for Legal History and the American Council of Learned Societies.

Dr. Robert J. Kaczorowski is a Professor of Law at the Fordham Law School. He has authored numerous books and articles on the Reconstruction amendments to the Constitution and the civil rights legislation of the era.

Dr. David Levering Lewis is the Julius Silver University Professor and Professor of History at New York University. His is a former president of the Society of American Historians and a fellow of the American Academy of Arts and Sciences. Dr. Lewis's biography of W.E.B. Du Bois earned two Pulitzer Prizes.

Dr. Leon F. Litwack is the Alexander F. and May T. Morrison Professor of History Emeritus at the University of California at Berkeley. He has written extensively on the subjects of slavery and African-American history. His book on the experience of the freedmen during Reconstruction was awarded the Pulitzer Prize in history and the American Book Award.

Dr. James M. McPherson is the George Henry Davis '86 Professor Emeritus of United States History at Princeton University and a past president

of the American Historical Association. He received the Pulitzer Prize for his 2003 Civil War history, *Battle Cry of Freedom*.

Dr. William M. Wiecek is the Chester Adgate Congdon Professor of Public Law and Legislation and a Professor of History at Syracuse University. He has written extensively on slavery and abolition, and on the nineteenth-century development of the constitution.

As historians, *Amici*'s professional responsibility is to explain and contextualize historical facts. Accordingly, they are particularly qualified to provide the Court with a historical perspective on the interpretive question presented in this dispute.

Established in the fall of 2005 at Harvard Law School, the Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) seeks to honor the extraordinary contributions of one of the great lawyers of the twentieth century. Charles Hamilton Houston dedicated his life to using the law to address matters of racial discrimination. CHHIRJ is committed to continuing Mr. Houston's legacy through research, instruction, and advocacy.

## SUMMARY OF ARGUMENT

Congress passed the Civil Rights Act of 1866 in part as a response to reports of persistent interference with the rights of freed slaves to contract for paid work and then to receive the compensation they had earned. Among the reports the legislature received were numerous stories of freedmen who performed their obligations under a contract of

employment and then found themselves subject to ridicule, abuse and violence when they sought to enforce their right to be paid under the agreement. Other reports described freedmen who were punished with violence and imprisonment in response to their efforts to seek redress for nonpayment. And still others told stories of freedman who, in exercising their rights *not* to contract with particular employers, faced violent retaliation.

These reports provide the best evidence of what the 39th Congress sought to achieve in guaranteeing all citizens the rights that white citizens enjoyed to "make and enforce contracts." The events surrounding the passage and enforcement of the Civil Rights Act of 1866 demonstrate the integral role that reprisals and the fear of reprisals played in withholding from the freed slaves their right to enter into and enforce contracts. Protection from retaliation was an important element of the enforcement of contractual rights when the law was first passed, and it remains so today.

## ARGUMENT

### I. The Civil Rights Act of 1866 Must Be Understood in the Broader Context of Reconstruction Politics and Legislation

As enacted on April 9, 1866, Section 1 of the Civil Rights Act provided that

> [A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, shall have the same right,

> in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens...

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. Codified today at 42 U.S.C. § 1981, the portion of the 1866 law guaranteeing the right to "make and enforce contracts" remained largely unchanged from the time of its enactment until the clarifying amendments of 1991. The 1991 Amendments did not change the core protections guaranteed by the original statute, but simply clarified their breadth in response to a 1989 decision of this Court. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

The Court has been asked in this case to interpret the scope of the right to "make and enforce contracts" within the meaning of § 1981. In particular, this case raises the question whether the right to make and enforce contracts on the same terms as white citizens encompasses a prohibition against retaliation for the assertion of contract rights. This is a question that can only be answered with some appreciation of the context within which the 39th Congress was legislating.

The bill that would become the Civil Rights Act was brought to the legislature in early 1866, just a month after ratification of the Thirteenth Amendment. It was introduced as a measure to enforce that Amendment and to address the persistent and widespread discrimination that

freedmen faced in the South. *See* Congressional Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull, introducing the bill in the Senate). Slavery had been abolished, but former slaves were still being denied basic civil rights. Mistreatment of the freedmen came through local and individual resistance to their new status as well as through the more formal mechanisms of the Southern states' newly enacted 'Black Codes,' which defined and limited the rights of the ex-slaves. *See* Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877,* 199-200 (1988) (hereinafter "*Reconstruction*"); Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 Temple Pol. & Civ. Rts. L. Rev. 389, 402-409 (2004) (hereinafter "*Historical Context of the Fourteenth Amendment*").

Congress debated and passed the Civil Rights Act against a backdrop of reports of startling violence against the former slaves, including regular floggings, whippings, castration and murder. *Id.* at 404-408. Much of that violence was directed at the efforts of freedmen to make and enforce contracts for paid labor. Among other instances of brutality, the years following the Civil War saw regular reprisals by white landowners and others against former slaves who sought to exercise their contractual rights. Reports from the Bureau of Refugees, Freedmen and Abandoned Lands (the Freedmen's Bureau) and others who traveled the South or received testimony about the conditions there gave Congress a clear and detailed picture of the hurdles the former slaves faced in their efforts to assert the basic rights of citizenship.

Moreover, the Civil Rights Act of 1866 was part of a larger body of legislation aimed at restoring order

and ensuring civil rights to freedmen in the South and throughout the nation. Thus, the Act should be interpreted in light of the larger corpus of laws—including the Freedmen's Bureau Acts of 1865 and 1866, the Enforcement Act of 1870, and the Thirteenth and Fourteenth Amendments to the Constitution—that sought to define and protect a new civil status for the freed people. *See* Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights—1866-1876*, 13 (1985) (hereinafter *"The Politics of Judicial Interpretation"*); C. Fairman, *Reconstruction and Reunion 1864-88,* 1117-1206 (1971); John Hope Franklin & Alfred A Moss, Jr., *From Slavery to Freedom: A History of African Americans* 252 (8th ed. 2000).

## II. The Freedmen Faced Regular and Violent Retaliation When They Sought to Make or Enforce Contracts

The years following emancipation were a time of widespread violence against the freedmen in the South. That violence was often an incident of the former slaves' attempts to act as free laborers – making, declining or enforcing contractual arrangements. Indeed,

> the largest number of violent acts stemmed from disputes arising from black efforts to assert their freedom from control by their former masters. Freedmen were assaulted and murdered for attempting to leave plantations, disputing contract settlements, not laboring in the manner desired by their

> employers, attempting to buy or rent land, and resisting whippings.

*Reconstruction,* 121. A detailed study of violent conduct in the state of Texas found that "[w]hen Texas blacks decided to control their own labor and make the best arrangements with whom and where they worked, their actions provoked physical assaults, injuries and even death." Barry Crouch, *A Spirit of Lawlessness: White Violence; Texas Blacks, 1865-68*, 18 J. Soc. History 217, 222 (Winter, 1984) (hereinafter *"A Spirit of Lawlessness").* Data from other states reveal the same patterns.

These data were before Congress as it considered the enactment of the 1866 Civil Rights Act. Several different reports on the status of former slaves in the South, and on the progress of the Freedmen's Bureau, offered the legislators a picture of the difficulties attendant to the transition from slave to free labor. Freedmen's Bureau Director Oliver Otis Howard prepared a lengthy report to Congress, observing repeatedly the difficulties attendant to compelling both former masters and former slaves to participate in labor contracts. Report of the Commissioner of the Bureau of Refugees, Freedmen and Abandoned Lands, 1865, H.R. Ex. Doc. No. 11, 39th Cong., 1st Sess. (1865) (hereinafter "Howard Report"). Major General Carl Schurz traveled throughout the South, interviewing people and observing conditions in the ex-Confederate states and reported his findings to Congress in an influential document replete with stories of Southern violence stemming from the "prevailing sentiment" that "you cannot make the negro work without physical compulsion." Report of Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi and Louisiana, 1865, S. Ex.

Doc. No. 2, 16, 73-74, 91, 39th Cong., 1st Sess. (1865) (hereinafter "Schurz Report"). The Joint Committee on Reconstruction heard testimony about conditions in the Southern states that further corroborated the extent of the violence. This extensive testimony was contained in the Committee's final report. Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. (1866) (hereinafter "Report on Reconstruction"). All three of these reports, as well as personal letters and communication detailing mistreatment of the ex-slaves, were frequently referenced in the legislative debates on the Civil Rights Act. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 39-40, 93-95, 1159-60, 1833-35, 1838-39.

In these and other reports, Congress confronted a landscape of violent contract "negotiation." Many southern white landowners had difficulty conceiving of the former slaves as possessing the right to enter into labor contracts. A report from Virginia explained that, in some cases, blacks were tied up by the thumbs if they did not agree to work for the price set by landowners and then were forced to sign contracts "agreeing" to the price when they could no longer stand the pain. Report on Reconstruction, pt. ii, 55. One observer reported that "[t]here is a disposition on the part of [white] citizens to secure, as far as possible, the same control over the freedmen by contracts which [the whites] possessed when they held them as slaves." *Id.*, pt. ii, 123. *See also Historical Context of the Fourteenth Amendment*, at 403 (detailing the ways in which contract "rights" were used to "undermin[e] black freedom").

Most of the available evidence of the difficult transition from slave to free labor comes from reports

by officers of the Freedmen's Bureau. These officers were stationed throughout the South and were charged with "assisting at the birth of a free labor society." *Reconstruction*, 142. The reports from these officers reveal patterns of retaliation by landowners against former slaves who sought to exercise their right not to contract, who sought payment under contracts, and who reported contract violations to authorities.

In some instances, former slave owners retaliated with physical abuse when the freedmen refused to enter contracts. In North Carolina, for example, a former slaveholder "hired his people for the season" and "claimed that they consented willingly." The ex-slaves told a different story: "when one of them demurred at the offer, his son James flew at him and cuffed and kicked him" and the others remained because "they were actually afraid to try to get away." W.E.B. Du Bois, *Black Reconstruction in America, 1860-1880*, at 138 (1935). *See also* Schurz Report, at 103.

One Freedmen's Bureau officer in South Carolina reported the story of a freedman who had planted a crop and worked it for his former master. When the crop was ready to harvest, the former master asked the freedman and others who had worked with him to "sign a contract for their lifetime. They . . . refused to sign any such contract and [the former master] drove them away without food or any compensation for their labor." D. Sterling, ed., *The Trouble They Seen: The Story of Reconstruction in the Words of African Americans* 51 (1994) (hereinafter *"The Trouble They Seen"*). Another group of South Carolina freedmen wrote a letter to the Bureau explaining, "We then contracted with our former owners for a part of the

crop last year, and at the close of the year we were driven off without anything or any settlement for our year's work because we would not contract with them for the present year." *Id.* at p. 53.

In a September 5, 1865 letter to the editor of the paper *The Liberator*, a group of black Virginians explained why something more than a proclamation of emancipation was necessary to secure the legal rights of the freedmen, mentioning in particular that "there are a number of cases in which a faithful performance by colored men of the labor contracted for has been met by a contemptuous refusal of the stipulated compensation." *The Trouble They Seen*, at 63. *See also* Schurz Report, at 73 ("they labor for the smallest pittance and plainest food, and are too often driven off deprived of the small compensation they labored for."); Reports of Asst. Comm. of the Freedmen's Bureau, 1865-66, S. Exec. Doc. No. 27, 23, 39th Cong., 1st Sess. (1866) ("Besides those cases specified in the report, where freedmen have been driven away by their employers without pay for labor done, a report has been received from one of the agents on the coast, giving a list of seven planters who have thus defrauded their employes [*sic*] out of pay to the amount of over seventeen hundred dollars.").

Some of the reports describe former slaves being threatened with violent reprisal if they dared to leave employers, even in the face of breach of contract by the employer. For example, one freedman who did flee his plantation for Atlanta explained:

> The gentleman I was working with, he wanted me to work for nothing. I had made thirty bags of cotton and he promised

> me half. I went to him after I made the crop and asked for some pay to support my family. He said I should stay and work for nothing. He said if I undertook to leave he would Ku-Klux me.

*The Trouble They Seen*, at 386-87. The Congressional Joint Committee on Reconstruction heard testimony about an organization known as the "black cavalry," which forcibly returned freedmen who had left their original masters to look for other employment. Report on Reconstruction, pt. iii, 145. *See also* Schurz Rep. at 19; *Historical Context of the Fourteenth Amendment*, at 408; *Reconstruction*, at 121; Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* 277 (1979).

Violent reprisals also followed efforts to report contract violations to authorities. A Louisiana Freedmen's Bureau chief told the story of a large number of freedmen who went to work on a plantation where they were promised rations and a salary. When the salary was not paid, and the rations charged out of the promised monthly pay, some of the freedmen went to complain to the Bureau. They were followed by one of the white employees from the plantation, arrested, and held in prison for weeks or months. *The Trouble They Seen*, at 73-74.[2]

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[2] This kind of conduct continued even after passage of the 1866 law, and Congress continued to receive reports of terrible reprisals against freedmen seeking to assert their contractual rights. The story told by freedman Hiram Smith in testimony to Congress is a particularly stark example of retaliation for the attempt to exercise contractual rights. "My name is Hiram Smith. I live on Joe Williams' place. I asked Mr. Williams to pay me what he owed me on my cotton; also $75 he had taken

As these stories suggest, violence often erupted at the end of a working season, when freedmen would seek payment for the work they had done under the terms of the contracts they entered with their former masters or other white landowners. Sometimes whites retaliated against the freedmen simply for asserting their contractual rights. Other times, the violence followed former slaves' efforts to report the misconduct to the Freedmen's Bureau. One study found that "[l]aborers deluged the Bureau with grievances asserting they received too little or no compensation whatsoever from their employers." *A Spirit of Lawlessness*, at 223. In those instances in which a Freedmen's Bureau court actually heard a complaint of non-payment, "retaliation was too often the result. Oliver, a Montgomery County freedman, was killed for bringing his employer before the Bureau, while an Anderson County black man, Henry Jones, was waylaid and murdered by his boss because Jones sued him for seven dollars." *Id.*

When the federal legislature determined to guarantee the rights of citizenship to the ex-slaves and to curb the abuse that the freedmen faced in the wake of emancipation, the reports of retaliatory misconduct described here formed an important part of the conduct congress sought to make unlawful.

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from me. He jumped on me and beat me so badly I fear I cannot live. He made me crawl on my knees and call [him] my God, my master, the God of all power, all because I had asked him for a settlement." S. Rep. No. 693, 46th Cong., 2nd Sess. (1880). Another man described his interactions with freedman in Louisiana: "I asked several of them, "Do you not live well?" They told me, "No, the white men take all we make and if we say anything about our rights they beat us." *Id.*

## III. The Right to Enforce a Contract Includes a Right Not to be Retaliated Against for Asserting Rights Under the Contract

The 39th Congress passed the Civil Rights Act of 1866 to enforce the Thirteenth Amendment and to eliminate the "badges of slavery" that remained in local law and custom even after the formal prohibition of slavery. This broad civil rights law was part of a series of legislative enactments that included the creation of the Freedmen's Bureau as a short-term solution to the pervasive problems faced by the ex-slaves. The Civil Rights Act aimed at a longer-term solution, guaranteeing to the ex-slaves "the great fundamental rights" of citizenship. Cong. Globe, 39th Cong, 1st Sess. 474 (1866).

The best evidence of what the 39th Congress intended in the Civil Rights Act's guarantee of an equal right to "make and enforce contracts" is the evidence offered in Part II, *supra*. The reports detailed there offer some sense of the evils the legislature sought to address. There was very little mention in the congressional debates about this specific provision, and the words themselves provide only limited clarification. Given the available information, the right to "make and enforce contracts" is appropriately understood to include protection against retaliation for seeking to assert contract rights.

*Amici* for CBOCS argue that the absence of a specific anti-retaliation provision in the text of the 1866 statute suggests the legislature did not intend to prohibit retaliatory conduct. *See* Brief Amicus Curiae for the Chamber of Commerce of the United States of America in Support of Petitioner at 8; see

also J.A. 160 (Easterbrook, C.J. dissenting) (asserting that Section 1981 predated "anti-retaliation norms"). This argument inappropriately applies modern legislative drafting standards to a statute enacted more than 140 years ago.

The Civil Rights Act of 1866 was passed as a part of a corpus of legislative enactments that includes not only other federal statutes, but also the Thirteenth and Fourteenth Amendments to the Constitution. *See The Politics of Judicial Interpretation,* at 13. The 1866 law does not include specific prohibitions, but instead catalogs what Sen. Lyman Trumbull described, in introducing the bill to the Senate, as a collection of "great fundamental rights." Cong. Globe, 39th Cong. 1st Sess. 474 (1866). What the 39th Congress sought to do with this law was to include protection for those rights widely viewed as basic, fundamental civil rights necessary for the constitutional guarantees of life, liberty and the pursuit of happiness. In doing so, the legislature was "fully aware of the breadth of the measure it had approved." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 433 (1968). The "broad language" that characterizes this law, *id.*, at 427, is quite unlike the more specific and technical prohibitions contained in statutes enacted in the past half century.[3] *See, e.g.,*

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[3] The 1991 amendments to the statute only make clearer the broad protections of the law. 42 U.S.C. § 1981(b) now defines "make and enforce contracts" to "include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." The right not to be retaliated against for seeking to enforce the terms of a contract is precisely the kind of benefit of the contractual relationship that the freedmen lacked and that Congress sought to provide in 1866. The 1991 legislature, in responding to the view expressed in *Patterson* v.

Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565, 579-90 (1989).

The breadth of the statutory language cannot reasonably be interpreted as a limitation on its scope. The legislature was well aware in 1866 of the risks that retaliation posed to any meaningful contract rights. As detailed in Part II, Congress confronted considerable evidence that the freedmen faced retaliation for their efforts to enter and assert rights under labor contracts. As Senator Trumbull declared, "There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits." Cong. Globe, 39th Cong., 1st Sess. 474. Protection from the kinds of reprisals suffered by freedmen who asserted their contract rights was and is a fundamental tool for ensuring that those contract rights are more than simply abstract principles.

The relationship between protection from retaliation and the effective enforcement of rights has been consistently recognized by this Court as well. In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Court permitted a claim for retaliation under 42 U.S.C. § 1982, which had also originally been enacted as part of the Civil Rights Act of 1866,

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*McLean Credit Union*, 491 U.S. 164 (1989), merely reaffirmed the strong protections the original Congress had authorized by providing further definition for the broad right to "make and enforce contracts." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

because it understood that perpetuation of racial discrimination would be aided by retaliatory conduct. 396 U.S. at 234-35. That reality has not changed, and it is no different in the context of the rights protected by § 1981 than those protected by § 1982. Indeed, for almost forty years, this Court's interpretation of § 1982 has been widely understood as settling the question of retaliation's place in the Civil Rights Act of 1866 and its modern iterations. *See, e.g., Skinner* v. *Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988); *Choudhury* v. *Polytechnic Inst. of New York*, 735 F.2d 38, 43 (2d Cir. 1984); *Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977); *Facaca* v. *Clements*, 506 F.2d 956 (5th Cir. 1975).

Other decisions, too, have drawn the connection between protection against retaliation and the right to "enforce" a contract. As Justice Thomas recognized in his dissenting opinion in *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 189 (2005), a claim for retaliation is an "enforcement mechanism"— "a claim that aids in enforcing another separate and distinct right." And these enforcement rights begin before formal legal proceedings have commenced. This Court in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989) expressly recognized as much, when it noted that the right to enforce contracts includes a right against interference with efforts to seek compliance with contract terms, either formally in court, or through other informal mechanisms (in *Patterson*, through the union grievance process, or here, through a complaint directly to the employer). *Id.* at 177.

The connections between retaliation and enforcement that are evident today were just as

apparent to the legislature in the nineteenth century. If a white plantation owner was permitted to retaliate against a former slave for seeking to enforce the terms of their contractual agreement, he would be interfering with the former slave's right to enforce the contract. The violence that such reprisals took in the 1860s finds its modern parallel in the kind of retaliatory firing faced by Hedrick Humphries today. Humphries sought to enforce the terms of his employment contract – including his right to be free from discriminatory treatment – and for these efforts he lost his job. The harm is not the physical assault suffered by the freedmen during Reconstruction, but the lost opportunity that flowed from Humphries' effort to enforce his employment contract on the same terms available to every citizen. That is precisely the type of opportunity that the 39th Congress aimed to protect.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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## APPENDIX A

In addition to the historians named in the caption, the following scholars have signed on to this brief. These scholars are legal historians and others whose work has focused on American legal history, race relations, the Civil War and Reconstruction and civil rights.

Richard L. Aynes, John F. Seiberling Chair of Constitutional Law, University of Akron School of Law

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Edward J. Balleisen, Associate Professor of History, Duke University

Dale Baum, Associate Professor of History, Texas A & M University

R. Ben Brown, Legal Studies Program, University of California at Berkeley

Robert Castro, Assistant Professor, California State University, Fullerton

Jane Dailey, Associate Professor of American History, University of Chicago

Elizabeth Dale, Associate Professor of History, University of Florida

James W. Fox Jr., Professor of Law, Stetson University College of Law

Eric Freedman, Maurice A. Deane Distinguished Professor of Constitutional Law, Hofstra University School of Law

Damon Freeman, Assistant Professor, University of Pennsylvania School of Social Policy and Practice

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Michael Green, The College of Southern Nevada

Ariela J. Gross, John B. & Alice R. Sharp Professor of Law and History, Gould School of Law, University of Southern California

Rebecca Hall, Visiting Professor of Law, S.J. Quinney College of Law, University of Utah

Samuel B. Hoff, Law Studies Director, College of Humanities and Social Sciences, Delaware State University

Peter Charles Hoffer, Distinguished Research Professor, University of Georgia

Kurt A. Hohenstein, Assistant Professor of History, Winona State University

J. Gordon Hylton, Professor of Law, Marquette University

Harold M. Hyman, William P. Hobby Professor of History Emeritus, Rice University

Maurice Jackson, Assistant Professor, Department of History, Georgetown University

Edward J. Jocque, Jr., Visiting Professor of History, Michigan State University

Sandra Jowers-Barber, Assistant Professor, University of the District of Columbia

Erin Rahne Kidwell, Adjunct Professor and Scholar-in-Residence, Georgetown Law School

Felicia Kornbluh, Assistant Professor of History, Duke University

Ethan J. Kytle, Assistant Professor, Department of History, California State University, Fresno

Jason S. Lantzer, Department of History, Indiana University, Purdue University, Indianapolis

Jonathan Lurie, Professor of History, Rutgers University

Kurt X. Metzmeier, Associate Professor of Legal Bibliography, Louis D. Brandeis School of Law, University of Louisville

Julie Novkov, Associate Professor of Political Science and Women's Studies, University at Albany, SUNY

Michael J. Pfeifer, Associate Professor, John Jay College of Criminal Justice, City University of New York

Andrew K. Sandoval-Strausz, Assistant Professor, Department of History, University of New Mexico

Judith Kelleher Schafer, Professor of History and Law, Tulane University

Gustav L. Seligmann, Associate Professor of History, University of North Texas

Stephen M. Sheppard, William H. Enfield Professor of Law, University of Arkansas School of Law

Manisha Sinha, Associate Professor, University of Massachusetts, Amherst

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Michael Stein, Professor of Law, William and Mary School of Law

Robert Strassfeld, Professor of Law, Case Western Reserve University School of Law

Barbara Terzian, Chair of the Department of History, Ohio Wesleyan University